
No. 2273

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL I. WELLES and JOHN DANIEL, Trustee
of METROPOLIS CONSTRUCTION COM-
PANY, a Corporation, Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN
FRANCISCO, a Corporation,

Appellee.

Supplemental
Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

At a stated term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee
of METROPOLIS CONSTRUCTION COM-
PANY, a Corporation, Bankrupt,
Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN
FRANCISCO, a Corporation,
Appellee.

**Order on Motion of Appellee for a Writ of Certiorari
for Diminution of the Record or for Correction
of Omission from Record by the Filing of a
Supplemental Transcript of Certain Portions of
the Record and Evidence.**

ORDERED, motion of counsel for the appellee for a Writ of Certiorari for Diminution of the Record under Rule 18 of this Court, or that this Court may direct that certain omissions from the Transcript filed herein may be corrected by a supplemental transcript properly certified, printed and filed

At a stated term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of METROPOLIS CONSTRUCTION COMPANY, a Corporation, Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation,

Appellee.

Order on Motion of Appellee for a Writ of Certiorari for Diminution of the Record or for Correction of Omission from Record by the Filing of a Supplemental Transcript of Certain Portions of the Record and Evidence.

ORDERED, motion of counsel for the appellee for a Writ of Certiorari for Diminution of the Record under Rule 18 of this Court, or that this Court may direct that certain omissions from the Transcript filed herein may be corrected by a supplemental transcript properly certified, printed and filed

herein, under Rule 76 of the Rules of Practice in Equity, argued by Mr. Charles J. Heggerty, counsel for the appellee and on behalf of said motion, and by Mr. C. A. S. Frost, counsel for the appellants and in opposition to said motion, and submitted to the Court for consideration and decision.

Thereupon, on consideration thereof, and the Court being fully advised in the premises, it is ORDERED that the said Motion be, and hereby is granted, and that Mr. Heggerty be, and he hereby is allowed ten (10) days within which to file an additional brief and a certified supplemental transcript of certain additional portions of the record and evidence in the above-entitled cause.

[Excerpt from Specifications Forming Part of Contract Between the Metropolitan Construction Co. and the Board of Public Works of the City and County of San Francisco, State of California (Annexed to Claim of Paul I. Welles).]

GENERAL PROVISIONS.

CITY ENGINEER: Whenever the words "City Engineer," or the personal pronoun used in place thereof, are used herein, they shall be and are mutually understood to refer to the City Engineer of the City and County of San Francisco, State of California, acting directly or through properly authorized agents, limited by the particular duties entrusted to them.

BOARD OF PUBLIC WORKS: Whenever the words "Board of Public Works," or the personal pronoun used in place thereof, are used herein, they

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shall be and are mutually understood to refer to the Board of Public Works of the City and County of San Francisco, State of California, acting directly or through properly authorized agents limited to the particular duties entrusted to them.

INSPECTOR: Whenever the word "Inspector," or the personal pronoun used in place thereof, is used herein, it shall be and is mutually understood to refer to the inspector or inspectors of the Bureau of Engineering, of the Department of Public Works, of the City and County of San Francisco, State of California, limited by the particular duties entrusted to him or them.

CONTRACTOR: Whenever the word "Contractor," or the personal pronoun used in place thereof is used herein, it shall be and is mutually understood to refer to the party or parties contracting to perform the work to be done under this contract, or the legal representatives of such party or parties.

CITY: Whenever the word "City," or the pronoun used in place thereof is used herein, it shall be and is mutually understood to refer to the City and County of San Francisco, State of California. [1*]

WORK TO BE DONE TO THE SATISFACTION OF THE BOARD OF PUBLIC WORKS: The Contractor shall do all the work and furnish all the labor, materials, tools and appliances necessary or proper for performing and completing the work herein required in the manner and within the time herein specified, and the work must be done in a workman-

*Page-number appearing at foot of page of original certified Record.

like manner and under the direction and to the satisfaction of the Board of Public Works, and the materials must be in accordance with the specifications and to the satisfaction of the Board of Public Works.

INSPECTION: All work and materials, and the manufacture and preparation of such materials from the beginning of the construction until the final completion and acceptance of the herein proposed work, shall be subject to the inspection and rejection of the City Engineer at such times as may suit his convenience.

The City Engineer may assign such assistants as he may deem necessary to inspect the materials to be furnished and the work to be done under this contract, and to see that the same strictly correspond with the specifications herein set forth.

Any unfaithful or imperfect work or materials that may be discovered before the completion and acceptance of the herein proposed work shall be corrected immediately on the requisition of the City Engineer, notwithstanding that it may have been overlooked by the proper inspector, and it is hereby expressly agreed that the inspection of the City Engineer shall not relieve the Contractor of his liability to furnish material and workmanship in accordance with the specifications and to the satisfaction of the Board of Public Works.

The Contractor shall promptly obey and follow every order or direction which shall be given by the Board of Public Works in accordance with the terms of the contract. [2]

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No inspector will be furnished to any gang of less than twelve (12) men, nor will any lines, levels or grades be furnished or given, when in the opinion of the Engineer, the number of men employed is too small to make proper progress.

Any work done during the absence of an Engineer or Inspector will not be estimated or paid for.

WORK TO BE DONE TO LINE AND GRADE:

All work under these specifications shall be done to the lines and grades shown on the plans, points for which will be set by the City Engineer, and the work shall be prosecuted in such manner and from such points, at such times and with such forces as the City Engineer may determine from time to time during its progress.

ACCESS TO WORK: During the construction of the herein proposed work, the Board of Public Works and the agents and employees of the Board of Public Works may at any time and for any purpose enter upon the work or the shops where such work may be in preparation and the Contractor shall provide proper and safe facilities therefor. Other contractors performing work for the City under the Board of Public Works may also, for all purposes which may be required by their contracts, enter upon the work.

INSPECTOR NOT TO BE INTIMIDATED: The Inspectors at all times shall be free to perform their duties and any intimidation of any Inspector on the part of the Contractor or of the employees thereof, shall be sufficient reason, if the Board of Public Works shall so decide, to annul the contract.

INTERPRETATION OF SPECIFICATIONS:

These specifications and plans are intended to be self-explanatory, but should any discrepancy appear or any misunderstanding arise as to the import of anything contained herein, the matter may be referred to the City Engineer, who shall decide the same in accordance with their true intent and meaning [3] as construed by him.

Any corrections of errors or omissions in these specifications or plans may be made by the City Engineer, when such correction is necessary for the proper fulfillment of their intention as construed by him.

The misplacement, addition or omission of any word, letter, figure or punctuation mark will in no way change the true spirit, intent or meaning of these specifications.

Wherever in the specifications, the words "as directed," "as required," "as permitted," or words of like effect are used, it shall be understood that the direction, requirement or permission of the Board of Public Works is intended. Similarly, the words "approved," "acceptable," "satisfactory," or words of like import, shall mean "approved by," or "acceptable to" or "satisfactory to" the Board of Public Works.

Whenever any article or any class of materials is specified by a trade name or by the name of any particular patentee, manufacturer or dealer, it shall be and is mutually understood to mean and specify the article or materials described, or any other equal thereto in quality, finish and durability, and equally

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as serviceable for the purposes for which it is or they are intended, subject to the approval and acceptance of the Board of Public Works.

Any part of the work which is not mentioned in these specifications but is shown on the drawings, or any part not shown on the drawings but described in the specifications, or any part not shown on the drawings or described in the specifications, but which is reasonably implied by either or is necessary or usual in the construction of work of this class shall be furnished and installed by the Contractor as if fully described in the specifications and shown on the drawings.

LAWS AND REGULATIONS: In all operations connected with the work, the Charter and all ordinances of the City and County of San Francisco, and all laws of the United States and the State of California [4] which shall be or become applicable to, and control or limit in any way the actions of those engaged in any way as principal or agent, shall be respected and strictly complied with. The Contractor shall keep himself fully informed of all existing State and National laws and City ordinances and regulations in any manner affecting those engaged and employed in or on the work or in any way affecting the conduct of the work, and of all orders or decrees of bodies or officials having jurisdiction or authority over the same. He shall, himself, at all times, observe and comply with and cause any and all persons, firms or corporations employed by him or under him, to observe and comply with all such laws, ordinances and regulations, orders and decrees.

He shall protect and indemnify the City and County of San Francisco, the Board of Public Works and its or their officers, employees and agents against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order or decree, whether by himself or his employees.

LEGAL ADDRESS: The address given in the bid or proposal is hereby designated as the legal address of the Contractor, but such address may be changed at any time by notice in writing, delivered to the Board of Public Works.

The delivering to such legal address or the depositing in any postoffice in a postpaid wrapper, directed to the Contractor at the above address of any drawing, notice, letter or other communication, shall be deemed to be a legal and sufficient service thereof upon the Contractor.

CONTRACTOR TO MAINTAIN OFFICE: The Contractor shall maintain an office equipped with telephone instruments connected with local and long distance telephone, in the City and County of San Francisco, during the continuance of his contract and shall have in said office at all times between 8:30 A. M. and 5:00 P. M. (Sundays and legal [5] holidays excepted), a representative authorized to receive drawings, notices, letters, or other communications from the Board of Public Works and such drawings, notices, letters or other communications given to or received by such representatives, shall be deemed to have been given to and received by the Contractor.

The delivering at or mailing to the Contractor's

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office in the City and County of San Francisco (written notice of which address shall be given to the Board of Public Works within ten days of the date of the contract) or the delivering to the Contractor in person or to his authorized representative in said City of San Francisco, of any drawing, notice, letter, or other communication shall also be deemed to be a legal and sufficient service thereof upon the Contractor.

COMMENCEMENT AND PROSECUTION OF WORK: The Contractor will be required to commence the work provided for in these specifications within fifteen (15) calendar days after the signing of the contract and to prosecute it diligently from day to day thereafter at such a rate as will enable him to complete the various parts of the work and the whole work within the time herein specified.

TESTS: All test specimens necessary for the determination of the character of any of the materials to be used or offered for use in the work herein proposed will be prepared and tested by the City Engineer.

Whenever required by the City Engineer, the Contractor shall furnish all tools, labor and materials necessary to make an examination of any work under these specifications that may be completed or in progress. Should such work be found defective, the cost of making such examinations and of reconstruction shall be defrayed by the Contractor. Should the work be found to be satisfactory, the examination will be paid for by the City in the manner herein prescribed for paying for extra work. [6]

SAMPLES: Samples of all materials used or offered for use in connection with this work and information as to their sources must be furnished to the Board of Public Works whenever required, and representatives of the Board of Public Works are to be given all desired facilities for the inspection of materials and processes used or to be used in connection with the work. Samples of the vitrified brick and steel for reinforcement must be submitted by the Contractor to the City Engineer for approval at least fifteen (15) days before it is proposed to use them in the work. Materials delivered on the work during its progress must be equal to the samples furnished. All materials will be inspected and any materials rejected must, on demand, be immediately removed from the work by the Contractor.

All samples shall be submitted in ample time to enable the City Engineer to make any tests or examinations necessary and the Contractor will be held responsible for any loss of time due to his neglect or failure to deliver the required samples to the City Engineer.

DEFECTIVE MATERIALS AND WORKMANSHIP: Materials, work or workmanship which in the opinion of the City Engineer do not conform to the specifications and drawings or are not equal to the samples submitted to and approved by the City Engineer shall be rejected.

If any materials used in the work or brought upon the ground, or selected for use in the same, shall be condemned by the City Engineer on account of bad or improper workmanship or as being unsuitable or

not in conformity with the specifications or not equal to the samples submitted, the Contractor shall forthwith remove from the work and its vicinity without delay all such rejected or condemned material of whatever kind, and upon his failure to do so within forty-eight (48) hours after having been so directed by the City Engineer, the condemned material may be removed by the Board of Public Works and the cost of said removal deducted from any money that is [7] then due or that may thereafter become due to the Contractor on account of or by virtue of his contract and no payments shall be made until such material, work or workmanship has been removed and proper materials and workmanship substituted therefor.

Materials or workmanship which, in the opinion of the City Engineer, do not comply with the requirements of the specifications or are not fully equal to the samples submitted to and approved by the City Engineer, may be rejected at any time during the progress of the work, notwithstanding any previous satisfactory testing or inspection on the part of the City Engineer.

CONTRACTOR TO SUPPLY SUFFICIENT AMOUNT OF MATERIAL: The Contractor shall at all times keep upon the premises a sufficient amount of materials and shall employ a sufficient number of workmen to complete the work herein specified within the time specified in the contract.

Should the Contractor at any time during the progress of the work refuse, neglect or be unable, in the judgment of the City Engineer, to supply a suf-

ficiency of materials or workmen to complete the work within the time specified in this contract, the City Engineer will notify the Board of Public Works that in his judgment, the Contractor is not providing sufficient materials or workmen to complete the work within the time specified in the contract. Upon receipt of such notice from the City Engineer, the Board of Public Works will notify the Contractor to furnish such workmen or materials as the City Engineer may consider necessary, and if the Contractor does not comply with said notice from the Board of Public Works within three (3) days of the date of service thereof, the Board of Public Works shall have the right to provide the materials and workmen to finish said work and the expense thereby incurred shall be deducted from any moneys due or which may thereafter become due under the contract. [8]

In order to meet the expenses so incurred, the Board of Public Works is hereby authorized by the Contractor to draw a warrant or warrants in the name of the Contractor and in favor of those persons, firms or corporations doing the work or providing the materials and labor, against the fund or appropriation set aside for the purposes of the contract, and when a warrant or warrants are so drawn they shall be conclusive upon the Contractor and shall be to all intents and purposes the same as if drawn by the Contractor in person, and the Auditor is hereby authorized by and on the part of the Contractor, to audit said demand or demands and the Treasurer is

hereby authorized by and on the part of the Contractor, to pay the same.

When any of said demands have been audited and paid, the amount of the same shall be deducted from the fund or appropriation set aside for the purposes of this contract and charged to the Contractor as if drawn by him.

The Board of Public Works shall have the option to terminate the contract in the manner hereinafter set forth, should the Contractor at any time during the progress of the work refuse, neglect, or be unable in their judgment, to supply a sufficiency of material or workmen to complete the work within the time specified in the contract.

PATENTS: All fees or claims for any patented invention, article or arrangement that may be used upon or in any manner connected with the doing of the herein proposed work or any part thereof shall be included in the price bid for doing the work herein proposed and the Contractor and his sureties shall protect and hold any and all departments of the City, together with all of its officers and employees, harmless against any and all demands made for such fees or claims against any and all suits and claims brought or made by the holder of any invention or patent, or growing out of any alleged infringement [9] of any invention or patent, and before the final payment is made on account of the contract, the Contractor shall furnish acceptable proof to the Board of Public Works of a proper release from all such fees or claims.

CITY TO HAVE FREE USE OF PATENTS:

The Contractor shall grant the City the free use for all time of any patented invention that may be used upon or in any manner connected with the doing of the herein proposed work or any part thereof, for the purpose of replacing or repairing any part or parts of the herein proposed work.

SUB-CONTRACTS: The Contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the Board of Public Works.

With his request to the Board of Public Works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the Contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sub-

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let, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works. [10]

No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works.

CONTRACTOR'S FOREMAN: The Contractor shall at all times during his absence be represented on the work by a foreman or foremen whom he has authorized and who is or are competent to receive and carry out any instructions that may be given to him or them by the Board of Public Works or its representatives, and the Contractor will be held liable for the faithful observance of any instructions which may be delivered to him or to his authorized representative or representatives on the work.

CONTRACTOR'S EMPLOYEES: The Contractor shall employ only competent and skillful men to do the work and whenever the City Engineer shall notify the Contractor in writing that any man on the work is, in his opinion, incompetent, unfaithful, disorderly or refuses to carry out the provisions of the contract or uses threatening or abusive language to any official or other person on the work representing the City and County of San Francisco, such man shall be immediately discharged from the work and shall not be employed again on it except with the consent of the City Engineer.

It is mutually understood and agreed that all the

laborers, skilled or unskilled (excepting confidential clerks, chief engineers and superintendents), who may be required in the construction of the work herein proposed, shall be citizens of the United States who are *bona fide* residents of the City and County of San Francisco.

USE OF STREETS: The Contractor shall not unnecessarily, in the judgment of the City Engineer, obstruct the streets or roadways by using them for storage of materials and supplies, and no materials or supplies [11] of any description shall be placed at any point along the line of the proposed sewers without first obtaining permission from the City Engineer.

NIGHT WORK: No night work requiring the presence of an engineer or inspector will be permitted, except in cases of emergency, and then only to such extent as is absolutely necessary and with the permission of the City Engineer, provided that this clause shall not operate in case of a gang organized for regular and continuous night work. In case any work is performed at night, the Contractor shall provide sufficient artificial light, in the judgment of the City Engineer, to properly prosecute the work.

SUNDAY WORK: No Sunday work will be permitted except in case of emergency, and then only with the consent of the City Engineer and to such an extent as he may judge to be necessary. The work to be done shall be under the general supervision of the City Engineer. At his discretion, he may from time to time direct the order in which and points at which the work will be prosecuted, and

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may exercise such general control over the conduct of the work at any time or place as shall be required, in his opinion, to safeguard the interests of the City. The Contractor shall immediately comply with and follow any and all orders and instructions given by the Engineer in accordance with the terms of this contract, but nothing herein contained shall be taken to relieve the Contractor of any of his obligations or liabilities under this contract.

ACCESS TO WORK: The Contractor shall furnish proper facilities, by means of ladders or otherwise, to secure convenient access to all parts of the work, as may be required by the City Engineer.

SPIRITUOUS LIQUORS: The Contractor shall neither permit nor suffer the introduction or use of spirituous liquors upon or about the work [12] herein contemplated or upon any ground occupied by him in the prosecution of the herein required work.

SANITARY CONVENIENCES: Necessary conveniences will be constructed by the Contractor where needed for the use of laborers on the work, and their use shall be strictly enforced. The Contractor shall obey and enforce such sanitary regulations as may be prescribed by the Board of Health.

OFFICE AND TELEPHONE: The Contractor will construct on the work where directed by the City Engineer, a suitable office equipped with a table not less than three (3) feet wide by six (6) feet long; three chairs, a set of the plans and specifications. Telephone instruments connected with local and long distance telephones will be installed

therein and maintained at the expense of the Contractor.

Representatives of the Board of Public Works and the City Engineer, are to have the free use of this office and telephone.

CO-OPERATION: The Contractor shall co-operate with all other contractors who may be employed by the Board of Public Works on construction work in or on the streets in which the herein proposed work is to be performed, and he shall so conduct his operations as not to interfere with the work of other contractors or workmen employed by the Board of Public Works. He shall promptly make good, at his own expense, any injury or damage that may be sustained by the work of other contractors or employees of the Board of Public Works at his hands.

Any differences or conflicts which may arise between the Contractor and other contractors or the workmen of the Board of Public Works in regard to their work shall be adjusted and determined by the City Engineer. The Contractor shall suspend any part or all of the work herein specified or shall carry on the same in such a manner [13] as may be prescribed by the City Engineer, when the City Engineer considers such suspension or prosecution of the work necessary in order to facilitate the work of other contractors or workmen and no damage or claim by the Contractor will be allowed therefor other than an extension of the time specified in this contract for the completion of the work, for such a period of time as the City Engineer shall

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certify in writing that the Contractor has been, in his opinion, delayed in the final completion of the work by reason of the work of other contractors or workmen.

The Contractor shall be held liable for any damage or delay to other contractors which may be caused by unnecessary delay or carelessness on his part.

PROTECTION OF THE WORK AND THE PUBLIC AGAINST DAMAGE: The Contractor shall protect his work and materials from damage due to the nature of the work, the action of the elements, the carelessness of other contractors, or from any other cause whatsoever, until the completion and acceptance of the work. Should any such damage occur, he shall repair it at his own expense, and leave the work to the satisfaction of the Board of Public Works in every particular. Neither the Board of Public Works nor any of its agents assumes any responsibility for collecting indemnity from the person or persons causing damage to the work of this Contractor.

The Contractor shall assume all responsibility for damage, arising from or in consequence of the execution of his contract, to adjoining work or property, the streets, sidewalks, mains, pipes, wires, poles or any other structures, interest or persons whatever, during the progress of the work contracted for, and shall furnish all guards, walks and lights and take all necessary precautions to prevent such damage.

REMOVAL OF RUBBISH: During the progress of the work the Contractor shall remove, upon de-

mand, such refuse material resulting from his [14] work or resulting from the work of other contractors as the City Engineer may direct. No additional allowance will be made for this work in the final estimate.

CONNECTIONS WITH PROPOSED SEWERS:

The Board of Public Works shall have the right to discharge sewage into, connect any sewer or sewers with the sewer or sewers herein proposed, and no extra allowance will be made the Contractor in the final estimate on account thereof, and it is mutually agreed and understood that the making of such connection or connections and the discharge of sewage therefrom into the sewer or sewers herein proposed shall not be construed as an acceptance of any part of the work contracted for.

SEWERS TO BE CLEANED: During the progress of the work and until the entire completion and final acceptance thereof, the sewers, connections and their appurtenances are to be kept thoroughly clean throughout and left clean. If, in the final inspection of the work herein proposed, any obstruction or deposit is discovered in the sewers, appurtenances or any of their connections constructed under this contract, it shall, upon demand by the City Engineer, be removed at once by the Contractor.

CONTRACTOR TO INFORM HIMSELF CONCERNING UNUSUAL DIFFICULTIES: The Contractor is directed to inform himself, by carefully examining the location of the work and by such other means as he may prefer, as to the character and respective amounts of all the classes of material

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that may be encountered in doing any excavating that may be necessary for the proper prosecution of the work herein contemplated and also of the amount of storm water, ground water and sewage he will be required to pump, bail or otherwise remove. He is also directed to make a special exhaustive inquiry at the office of any person or persons owning, controlling or operating any system or systems of railways, pipes, conduits, wires or any other structures that may be [15] on, over or under the surface of the street or streets along which the proposed work is to be done, and to determine, to his satisfaction, the character, size, location and length of such system or systems of railways, pipes, conduits, wires, structures, etc., and the extent that they will increase the expense of performing the work herein proposed, and to inspect the public records of the various City Departments having cognizance or control of systems of railways, pipes, conduits, sewers, wires or any other structure or structures that may be on, over or under the surface of the streets, and he is hereby directed to include in the unit price that he bids for the various portions of the work herein proposed, any and all expense he may be put to because of the existence and handling of any difficult or unusual classes of material, unusual amounts of storm water, ground water, and sewage in performing any part of the work herein contemplated and because of any additional work or delay that may be caused directly or indirectly by any or all of the hereinbefore mentioned or any other obstructions, and it is clearly understood that the

Board of Public Works does not insure the accuracy of any of the before mentioned records, reports or information and the Contractor agrees not to make any claim against the City and County of San Francisco or any of its officials or employees for any damage, extra work or expense caused by unforeseen difficulties of construction or occasioned by his relying upon any such records, reports or information, either as a whole or in part, furnished by any City Department, official or employee, or by any Company.

CHANGES AND EXTRAS: The Contractor shall do any and all extra work necessary for the proper construction or completion of the whole work herein contemplated that may be ordered by the Board of Public Works, in accordance with the provisions of Resolution No. 1246 (Second Series), of the Board of Public Works, and as full compensation for such extra work the Contractor shall accept an amount [16] equal to the actual cost of the work estimated by the Board of Public Works plus twenty (20) per cent for profit. In estimating the cost for extra work no allowance will be made for the use of tools, plant, or for general superintendence.

ALTERATIONS: The Board of Public Works, by resolution, may order alterations in the amount or dimensions of the work herein contemplated or any part thereof, either before or after the commencement of construction.

If said alterations increase the amount of concrete, reinforcing steel or excavation required to complete the work, the Contractor shall accept as full com-

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pensation for such increase in material and labor, the following amounts:

For each such cubic foot of concrete completed in place.....\$0.25

For each such pound of reinforcing steel in place\$0.04

For each such cubic yard of excavation, including such additional or extra shoring, bracing, pumping and draining that said excavation may necessitate.....\$0.75

In case said changes decrease the amount of concrete, reinforcing steel or excavation required by the plans, the price bid by the Contractor for doing the work herein required shall be decreased in the final settlement by the following amounts:

For each cubic foot of concrete less than required by the plans.....\$0.25

For each pound of reinforcing steel less than required by the plans.....\$0.04

For each cubic yard of excavation less than required by the plans.....\$0.75

If such alterations diminish the quantity of work or materials of a class for which there is no price established in the contract, there shall be deducted from the contract price an amount equal to the actual cost of the work not performed, as estimated by the City Engineer, plus fifteen (15) per cent of said actual cost. In estimating the cost of work not performed no allowance will be made for the use [17] of tools, plants, or for general superintendence and the Contractor shall make no claim for damages because of anticipated profits on any work

that may be dispensed with.

In case such alterations increase the amount of work or materials of a class for which there is no price established in the contract, the Contractor shall accept as full compensation for such additional work an amount equal to the actual cost of the additional work as estimated by the City Engineer, plus fifteen (15) per cent for profit. In estimating the cost of additional work, the City Engineer will make no allowance for the use of tools, plants or for general superintendence.

TERMINATION OF CONTRACT: All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the Contractor shall be deemed a breach of the contract.

Should the Contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.

The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the Contractor shall be deemed a complete termination of the contract.

Upon the contract being so terminated, the Contractor shall immediately remove from the vicinity of the work all materials and personal property belonging to him, which have not already been used in the prosecution of the work, or which is not in place in the work, and he shall forfeit all sums due

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to him under the contract, and both he and his sureties shall be liable upon his bond for all expense and damages caused the City and County of San Francisco by reason of his failure to complete the contract.

MEASUREMENTS, ETC.: In estimating and allowing quantities, all lengths will be based on horizontal measurements. [18]

Main sewers will be measured along their center lines, from center to center of manholes.

Side sewers and culvert pipes will be measured from the bell of the slant of the T branch.

No extra allowance will be made for slants, future pipe sewer connections or culvert connections in the masonry sewers.

No extra allowance will be made for closing openings in existing brick sewers with brick work.

All cut-offs from piles are to be the property of the Contractor and no allowance will be made for the portion of the pile above the cut-off.

PRICE TO COVER: In naming a price for performing the work of constructing any of the herein described sewers and structures, bidders are directed to include in said price the cost of completing the sewer or structure, together with the cost of removing the existing sewers from the streets wherein the new work is proposed, or opening and filling them with sand and removing and disposing of their contents, as ordered by the Board of Public Works, the cost of excavating, lagging or shoring and bracing, draining, refilling, disposing of surplus material from and removing and restoring the pavement over

such excavations as are necessary and maintaining such property of public service corporations and underground structures as may be encountered in the performance of said work, as no additional allowance will be made in the final estimate for performing any of the above named work.

HOURS OF LABOR: In the performance of the herein proposed work, eight (8) hours shall be the maximum hours of labor on any calendar day.

AMOUNT OF WORK ESTIMATED: The amount of each class of work has been preliminarily estimated as follows, and this estimate will be used as a basis for comparing bids. The Board of Public Works does not expressly [19] or by implication agree that the actual amount of work will correspond to said estimate, but reserves the right to increase or decrease the amount of any class or portion of the work as is in its opinion to the interest of the City and County of San Francisco.

BASIS OF FINAL PAYMENT: Final payment will be made on the basis of the amount of each class of work actually done in accordance with the specifications and to the satisfaction of the Board of Public Works. [20]

[Certificate of Referee in Bankruptcy to Part of Specifications Called "General Provisions."]

I, Armand B. Kreft, Referee in Bankruptcy, to whom the Matter of Metropolis Construction Co., Bankruptcy, #6827, in the District Court of the United States for the Northern District of California, was referred, do hereby certify the foregoing to be a full, true and correct copy of that part of

Portuguese-American Bank of San Francisco. 27

the specifications called "General Provisions," which are annexed to and made part of the contract between the Metropolis Construction Co., and the Board of Public Works of the City and County of San Francisco, State of California, dated July 22, 1910, and which are annexed to the claim of Paul I. Welles, filed in my office in said District Court of the United States, in the Matter of Metropolis Construction Company, a Corporation, Bankruptcy, No. 6827, now remaining on file and of record in my office.

ATTEST my hand, this 28th day of April, A. D. 1914.

ARMAND B. KREFT,
Referee in Bankruptcy.

**[Certificate of Clerk U. S. District Court to Copy of
Certified Copy of That Part of Specifications
Called "General Provisions," etc.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed twenty pages, numbered from 1 to 20, inclusive, contain a full, true and correct copy of a certified copy made by A. B. Kreft, Referee in Bankruptcy, of that part of the "Specifications" called "General Provisions," annexed to the contract between the Metropolis Construction Co. and the Board of Public Works of the City and County of San Francisco, dated July 22, 1910, and which specifications are annexed to the claim of Paul I. Welles, in the Matter of the Metropolis Construction Co.,

28 *Paul I. Welles and John Daniel vs.*

No. 6827, in Bankruptcy, as the same now appears on file and of record in my office, in case No. 15,148, Paul I. Welles, Complainant, vs. John Daniel, Trustee of the Estate of Metropolis Construction Co., a Corp., Bankrupt, Portuguese-American Bank of San Francisco, a Corp., and Thomas F. Boyle, Defendants.

I further certify that said Armand B. Kreft, Esq., is a duly appointed Referee in Bankruptcy of this court, and that the bankruptcy matter of the Metropolis Construction Co. herein referred to was duly referred to and is now pending before said Referee.

I further certify that the costs of preparing and certifying the foregoing is the sum of Ten Dollars (\$10), and that the same has been paid to me by the attorney for the Portuguese-American Bank of San Francisco, a corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court this 8th day of May, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: No. 2273. United States Circuit Court of Appeals for the Ninth Circuit. Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants, vs. Portuguese-American Bank of San Francisco, a Corporation, Appellee. Supplemental

Portuguese-American Bank of San Francisco. 29
Transcript of Record. Upon Appeal from the United
States District Court for the Northern District of
California, First Division.

Received and filed May 8, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

Upon Appeals from the United States District Court for the Northern District of California, First Division.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

At a Stated Term, to-wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room Thereof, in the City and County of San Francisco, in the State of California, on Thursday, the Thirtieth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present:

The Honorable William B. Gilbert, Circuit Judge;
Honorable Erskine M. Ross, Circuit Judge;
Honorable Charles E. Wolverton, District Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

Order of Submission.

On motion of Mr. Charles J. Heggerty, counsel for the appellee,—
Mr. C. A. S. Frost, counsel for the appellants consenting thereto,—
Ordered, appeals in the above-entitled cause submitted to the Court for consideration and decision on briefs, without oral argument, with leave to the appellants to file a reply-brief within ten (10) days from this date, and with leave to the appellee to reply thereto within five (5) days thereafter, if desired.

At a Stated Term, to-wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Ninth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:

The Honorable William B. Gilbert, Circuit Judge, Presiding;
Honorable Erskine M. Ross, Circuit Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

Order Directing Filing of Opinion and Filing and Recording of Decree.

Ordered, that the opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with said opinion.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

[Opinion U. S. Circuit Court of Appeals.]

Appeals from the United States District Court for the Northern District of California, First Division.

A. F. Morrison, P. F. Dunne, W. I. Brobeck, Gavin McNab, B. M. Aikins, and Milton J. Green, for Appellant, John Daniel.

C. A. S. Frost, for Appellant, Paul I. Welles.

George A. Knight, Charles J. Heggerty, James B. Feehan, and Joseph W. Beretta, for Appellee.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

The controversy herein concerns a fund of \$6,830.85, which became payable as the fourth progress payment to the Metropolis Con-

struction Company, for work in constructing a sewer under a contract with the Board of Public Works of the City and County of San Francisco. On or before December 5, 1910, the Construction company made a claim for that sum as due under its contract. On December 5th the Board of Public Works by resolution approved the claim. On the same day the Construction Company presented to the appellee a certified copy of the resolution together with two other such resolutions of dates prior thereto, approving claims aggregating about \$38,000.00, also a paper addressed to the city auditor, of date December 5, 1910, notifying him that the appellee was authorized and empowered to draw warrants in favor of the Construction Company for the payments on the contract. The appellee thereupon loaned to the Construction Company \$35,000.00. The claim for the fourth progress payment was not approved by the Board of Supervisors or the Mayor until January 3 and 4, 1911, nor did that Board or the Mayor receive notice of the order of the Construction Company on the auditor or of the rights of the appellee thereunder until December 19, 1910. In the meantime, on December 12 and 16, the appellant Welles, who was a subcontractor on the sewer work, gave a notice to the auditor, to the Board of Public Works and to the Board of Supervisors, to withhold from the Construction Company the fourth progress payment of \$6,830.85 under the provisions of Section 1184 of the Code of Civil Procedure. On December 17, 1910, the appellee notified the auditor, the Board of Public Works and the Supervisors that it claimed an assignment from the Construction Company of the fourth progress payment. On December 19, 1910, a petition in bankruptcy was filed against the Construction Company, and on January 5, 1911, it was adjudged a bankrupt. On January 26, 1911, the appellee began an action in the Superior Court of the State of California against the auditor to recover the money in controversy. On April 18, 1911, Welles began the present suit in equity against the appellee, the bankrupt, the auditor and the trustee in bankruptcy. Thereupon an order was made requiring the defendants in this suit to show cause why the auditor should not pay the money to the trustee to abide the result of the suit, and to show cause why the appellee should not be enjoined from prosecuting its action. The auditor and the appellee made return to the order. On July 11, 1911, the cause was referred to a referee to hear testimony and find facts on the order to show cause. On October 14, 1911, the referee made his report finding the facts, and no objections having been taken thereto the report was confirmed on December 12, 1911, and an order was made enjoining the appellee from prosecuting its action in the state court, and directing the auditor to pay the \$6,830.85 to the trustee in bankruptcy to abide the result of the suit. In the meantime, on October 6, 1911, the bankrupt filed its answer to the bill of complaint. On December 26, 1911, the cause was referred to the referee on final hearing to hear testimony and proof and find facts upon the issues arising on the pleadings. On March 8, 1912, the referee filed a brief report to the effect that his former findings were res adjudicata. To that report the appellee filed exceptions. On April 15, 1912, the excep

tions were sustained and the cause was again referred to the referee to ascertain and report the facts and his conclusions of law on the testimony taken and on file. On July 16 he reported his findings of fact, finding that the fourth progress payment was assigned to the appellee and that the right of the appellee to receive the same was not affected by the notices to withhold made by the appellant Welles. This report was subsequently confirmed. From the decree thereon rendered the present appeal is taken.

GILBERT, *Circuit Judge*, after stating the case:

The appellant Welles contends that he is entitled to priority by virtue of his notice to withhold, which was given under Section 1184 of the Code of Civil Procedure. That section provides, in substance, that a subcontractor may at any time give to the reputed owner a written notice that he has performed labor or furnished material, or both, to the contractor, which notice shall contain, among other things, the amount and value of that which has been furnished by the subcontractor, and that upon such notice being given it shall be the duty of the person who contracted with the contractor to withhold from the contractor, "sufficient money due or that may become due to such contractor or other person to answer such claim and any lien that may be filed thereafter for record under this chapter, including counsel fees not exceeding \$100 in each case, besides reasonable costs provided for in this chapter." The remedy thus provided for is disconnected from and additional to the remedy by lien upon the structure, and it has been held that it should be regarded with favor by the courts, *Bates v. Santa Barbara County*, 90 Cal. 543, that the notice operates as an assignment pro tanto of that which is due or to become due to the original contractor, and that that amount is sequestered as though under garnishment. *Hampton v. Christensen*, 84 Pac. 200. But the notice to withhold does not affect claims that have previously become due and have been transferred for value by the contractor. *Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585. In the case last cited the court said: "The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect on payments that have matured before it is given, but which have not been made, is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment is intercepted by the notice, but if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such party." And referring to the contract under consideration in that case, the court said: "The contract provided that the work be done to the satisfaction of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the obligation of the state which had

been created in favor of the contractors by the trustees became complete, and the right of the contractors to immediate payment became vested in them and was subject to their disposition. The provision in the contract for payment of the contract price in Comptroller's warrants on the state treasurer did not affect this power of disposition, or right to immediate payment, or suspend its exercise until such warrants should be obtained." It is urged that the fourth progress payment in the present case was not due, and that the demand of the Construction Company therefor did not mature by virtue of the resolution of the Board of Public Works, that there still remained to be obtained the approval of the Board of Supervisors and of the Mayor. Reference is made to the city charter then in force, Article II, Chapter 1, Section 19, which provides that all demands payable out of the treasury must be first approved by the Board of Supervisors before they can be approved by the auditor or paid by the treasurer, and that all demands for more than \$200 shall be presented also to the Mayor for his approval and that all resolutions directing the payment of money other than salaries or wages when the amount exceeds \$500 shall be published for five successive days, Sundays and legal holidays excepted, in the official newspaper. The contract in this case, however, was not made directly with the city. It was made between the Construction Company and the Board of Public Works under authority granted to that board by the charter. That Board was given therefore the power to decide that the conditions of the contract had been fulfilled and to approve claims for work done thereunder and to direct the payment of the same. The provision of that charter in regard to approval by the supervisors and mayor was a general precautionary measure prescribed as to all payments of money by the city, and it was intended only for the greater protection of the city. It had not the effect to vest in that board or the mayor authority to determine whether contracts had been complied with or whether payments had become due thereunder in cases where such power had been expressly delegated to the board of public works. The provision for the approval of the board of supervisors and the mayor, as related to the present case, stands upon the same plane as the contractual provision which was under review in *Newport Wharf & Lumber Co. v. Drew*, providing for the payment of the contract price in comptroller's warrants to be drawn on the state treasurer.

If therefore the appellee was on December 5, 1910, the assignee in good faith for value, of the fourth progress payment, its equities are superior to those of the appellant Welles. But it is urged that it was not such an assignee, that the contract in express terms provided that without the consent of the Board of Public Works the contractor "shall not either legally or equitably assign any of the moneys payable under this contract or his claim thereto," and that the Board neither knew nor assented to the assignment. The question arises whether this provision of the contract makes void the assignment which was made to the appellee. "A contract to pay money may doubtless be assigned by the person to whom the

money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable." *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488. In *Devlin v. Mayor, etc. of New York*, 63 N. Y. 8, Judge Allen said: "Parties may in terms prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations."

The appellee cites cases to the proposition that a provision whether contained in the instrument itself, or expressed in a statute, forbidding the assignment of the contract, or of any interest therein, does not stand in the way of a transfer of the moneys which have become due or are to become due the contractor thereunder. *Mueller v. Northwestern University*, 195 Ill. 236; *Lowry v. City of Duluth*, 94 Minn. 95; *Norton v. Whitehead*, 84 Cal. 263. Those decisions are based upon the proposition that the thing assigned is not the precise thing which is forbidden to be assigned. They are not directly applicable to the contract under consideration here, for the reason that here the prohibition is not against the assignment of the contract, but against the assignment of the moneys payable thereunder without the consent of the Board of Public Works. Cases are cited also which hold that where the contract prohibits assignment an assignment for security is not within the prohibition. *Fortunato v. Patten*, 147 N. Y. 277; *Crouse v. Mitchell*, 130 Mich. 347; *Butler v. Gage*, 14 Colo. 125. Those cases are not in point for the reason that here the prohibition is against both the legal and the equitable assignment of the moneys.

It is contended further that such a provision against assignment is intended for the benefit of the city alone, and that no one else can complain of its breach. *Fortunato v. Patten*, 147 N. Y. 277 is cited as a case in which it was so held. But in *Burek v. Taylor*, 152 U. S. 635, where a contract with a state for the erection of a public building was made unassignable by express stipulation, it was held that an attempted transfer of an interest in the contract without the state's consent was ineffectual further than to give a right of action against the contractor for a measure of the profits. It is argued, however, that that case is to be distinguished from the case at bar in that there was an absolute covenant on the part of the contractor in that case that the contract should not be assigned in whole or in part without the consent of the state. But the contract in the present case having been assented to in all its terms by the contractor is as binding upon him as if his obligations had been affirmatively expressed in a covenant to abide by the same. In *Burek v. Taylor* the Court said of the provision against assignment:

"It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the State, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the State was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interest in the contract

it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him."

We see no reason why this provision of the contract under consideration shall not be given the meaning and effect which its words import. It plainly stipulates against the assignment of the payments. There must have been substantial grounds for embodying such a provision in the contract. We may assume that one of the purposes, and probably the principal purpose thereof, was to protect subcontractors in their equitable rights to the unpaid funds in the hands of the city in case notice should be given under Section 1148, and to afford such subcontractors better opportunity to secure payment for that which they might contribute to the work which was under construction, as well as on behalf of the city to avoid the possible complications and litigation that might attend the transfer to another of the payments accruing under the contract. In a similar case the Supreme Court of Nebraska said:

"But it is needless for us to speculate on the motives for the city's action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated against an assignment of the contract. To hold that it covers some, but not all, of the rights and obligations arising out of the contract, would be, it seems to us, an inexcusable perversion of its terms." *City of Omaha v. Standard Oil Co.*, 55 Neb. 337. And again in *Murphy v. City of Plattsmouth*, 78 Neb. 163, that court held that where a contract with a city for a public improvement expressly provides that it shall not be assigned, such provision is enforceable, and an assignee thereof cannot recover the money due thereunder, or any part thereof. In 20 Am. & Eng. Enc. of Law 1156 it is said: "It is frequently provided by charter or statute or the contract itself, that a contract with a municipality shall not be assigned without the consent of the city, and such a provision is valid and operative according to its terms." Citing *Deffenbaugh v. Foster*, 40 Ind. 382; *Suburban Electric Light Co. v. Hempstead*, 38 N. Y. 443. In the first of the cases so cited it was held that where a contract for street improvement contained a provision that the contract should not be assigned without the consent of the common council, no one besides the contractor can maintain an action thereon in the absence of the common council's consent. The second case is of similar import.

The decree is reversed and the cause is remanded with instructions to enter a decree for the appellant Welles.

[Endorsed:] Opinion. Filed Mar. 9, 1914 [signed] F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee- of METROPOLIS CONSTRUCTION COMPANY, a Corporation, Bankrupt, Appellants,

VS.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

Decree [U. S. Circuit Court of Appeals].

Appeals from the District Court of the United States for the Northern District of California, First Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, First Division, and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellants and against the appellee, and that this cause be, and hereby is remanded with instructions to enter a decree for the appellant Welles.

It is further ordered, adjudged and decreed by this Court, that the appellants recover against the appellee for their costs herein expended, and have execution therefor.

[Endorsed:] Decree, U. S. Circuit Court of Appeals. Filed and Entered Mar. 9, 1914 [signed] F. D. Monekton, Clerk.

At a stated Term, to-wit: the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixth day of July, in the year of our Lord one thousand, nine hundred and fourteen.

Present:

The Honorable William W. Morrow, Circuit Judge, Presiding;
Honorable William C. Van Fleet, District Judge;
Honorable Maurice T. Dooling, District Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee- of METROPOLIS CON-
STRUCTION COMPANY, a Corporation, Bankrupt, Appellants,
vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation,
Appellee.

*Order Directing Filing of Opinion and Entry of Order Denying
Petition for Rehearing.*

Ordered, that the Opinion on Petition for Rehearing this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk, and that an order denying the petition for a rehearing in said cause be recorded in the minutes of this Court in accordance with the said opinion.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee- of METROPOLIS CON-
STRUCTION COMPANY, a Corporation, Bankrupt, Appellants,
vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation,
Appellee.

[Opinion U. S. Circuit Court of Appeals on Petition for Rehearing.]

GILBERT, Circuit Judge:

In aid of its petition for a rehearing the appellee was permitted to bring before this court certain portions of the record in the court below which were not contained in the transcript on the appeal, the same being certain provisions of the specifications which were referred to and made a part of the contract which was involved. The appellants answering the petition, object to the consideration of the new matter so brought before us, on the ground that the same was not read to nor brought to the attention of the court below. It is unnecessary to discuss that objection, for in our opinion the new matter so presented is not of such a nature as to affect the decision of the case on the appeal. The provisions of the specification so added to the record are as follows: "All conditions of this contract are considered material and failure to comply with any of said conditions on the part of contractor shall be deemed a breach of the contract. Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated." Then follow provisions as to the manner in which the contract may be terminated, and the provision that upon such termination the contractor shall forfeit all sums due him under the contract, and that both he and his surety shall be liable

upon his bond for all damages caused to the city by reason of his failure to complete the contract.

These provisions, in brief, give to the Board of Public Works the option to terminate the contract upon the failure or neglect of the contractor to perform any of the conditions thereof. It is not declared that the right to terminate the contract is the only remedy against the contractor for breach thereof, or of any of its provisions. On the contrary, it is declared that the Board of Public Works shall have that right, "whether any alternative right is provided or not." The provision that without the consent of the Board of Public Works the contractor "shall not either legally or equitably assign any of the moneys payable under this contract, or his claim thereto," is in no way affected by the provisions of the specifications above quoted. By no principle of reasoning can it be concluded that the provision for the termination of the contract upon breach of condition is tantamount to assent by the Board to the transfer of any of the moneys payable under the contract, or the contractor's claim thereto, nor would the act of terminating the contract, if resorted to, be an adequate remedy or any remedy for such a breach, and indeed the Board of Public Works might have no means of knowing that an assignment had been made. That breach of the contract is unlike all other possible breaches thereof, in that the latter are open and visible upon an inspection of the work, the maxim *expressio unius est exclusio alterius*, invoked by the appellee, is not applicable. The question is not one of the construction of a statute, but it is what was the intention of the parties as expressed in a contract. We find neither authority nor reason for applying the maxim to the provisions of a contract relating to the remedies to be pursued for default therein. The reverse has been held in a well-considered opinion in *Straus v. Yeager*, 93 N. E. 881.

It may be added that the District Court of Appeals of the State of California has recently decided a case in which it has expressed views which accord fully with the decision of this court. That court said: "There seems no valid reason for denying that parties may legally agree and bind themselves that such contract shall not be assigned. There is nothing in the statute to prohibit an agreement to that effect, nor is it opposed to any principle of sound public policy. * * * The assignment, however, in violation of the express provision of the contract, under the authorities, was null and void, even as to respondent company." *Butler v. San Francisco Gas & Electric Co.*, 16 C. A. D. 946.

The petition for a rehearing is denied.

(Endorsed:) Opinion on Petition for a Rehearing. Filed July 6, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

At a stated Term, to-wit: the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Monday the sixth day of July, in the year of our Lord One Thousand, Nine Hundred and Fourteen.

Present: The Honorable William W. Morrow, Circuit Judge, Presiding; Honorable William C. Van Fleet, District Judge; Honorable Maurice T. Dooling, District Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

Order Denying Petition for a Rehearing and Staying Issuance of Mandate under Rule 32.

In accordance with the opinion this day rendered by this Court in the above-entitled cause, and by direction of the Honorable William B. Gilbert and Erskine M. Ross, Circuit Judges, and Charles E. Wolverton, District Judge, before whom the cause was heard, it is ordered that the Petition filed April 6, 1914, on behalf of the appellee for a rehearing of the above-entitled cause be, and hereby is denied.

Thereupon, on motion of Mr. Charles J. Heggerty, counsel for the appellee, and good cause therefor appearing, it is ordered that the issuance of the mandate under Rule 32 of this Court in the above-entitled cause be, and hereby is stayed for the period of sixty (60) days from date.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation), Appellee.

Notice of Petition for Appeal [to Supreme Court U. S.] and Severance.

To the above named appellants, Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, and to Thomas F. Boyle, Auditor of the City and County of San Francisco:

You are hereby invited to join with the above named appellee, Portuguese-American Bank of San Francisco, a corporation, on or

before August 1st, 1914, in an appeal which it is about to take to the Supreme Court of the United States from the decree rendered and entered in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit, on the 9th day of March, 1914, or you will be deemed to have refused to join in said appeal and to have acquiesced in said decree and the above named appellee will prosecute said appeal without joining you therein.

And you are hereby notified that the above named appellee will, on the first day of August, 1914, present its petition for appeal from the decree aforesaid to Honorable W. W. Morrow, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, at his Chambers, in the United States Post Office Building, in San Francisco, California, at the hour of 10 o'clock A. M., and you are notified to united therein, or failing to do so you will be made respondents.

Dated: July 27, 1914.

**PORTUGUESE AMERICAN BANK OF
SAN FRANCISCO,**

(Signed) By JAMES B. FEEHAN,
(Signed) GEO. A. KNIGHT,
(Signed) CHAS. J. HEGGERTY,
(Signed) JAMES B. FEEHAN,
(Signed) JOSEPH W. BERETTA,

*Attorneys for Appellee, Portuguese-American Bank
of San Francisco, a Corporation, Crocker Building,
San Francisco, California.*

Receipt of a copy of the within Notice of Petition for Appeal and Severance this 27th day of July, 1914, is admitted.

(Signed) A. F. MORRISON,
P. F. DUNNE,
W. I. BROBECK,
GAVIN McNAB,
MILTON J. GREEN,

Solicitors for John Daniel, Trustee, etc., Appellant.

(Signed) C. A. S. FROST,
Solicitor for Paul I. Welles, Appellant.
(Signed) EDWARD F. MORAN,
Solicitor for Thomas F. Boyle, Appellee.

[Endorsed:] Notice of Petition for Appeal to Supreme Court
U. S. and Severance. Filed Jul-29, 1914. F. D. Monekton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation),
Appellee.

Petition for Appeal [to Supreme Court U. S.].

Your petitioner, Portuguese-American Bank of San Francisco (a corporation), appellee in the above entitled cause, conceiving itself aggrieved by the decree of the United States Circuit Court of Appeals for the Ninth Circuit, rendered therein and entered on the 9th day of March, 1914, reversing the decree of the District Court of the United States for the Northern District of California, First Division, hereby appeals from said decree of said United States Circuit Court of Appeals to the Supreme Court of the United States, and prays that its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

The matter in controversy in the above entitled cause exceeds the sum of six thousand dollars besides costs, and said cause is one in which the jurisdiction and Judgment of the United States Circuit Court of Appeals is not made final.

That the above named appellants Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a corporation, Bankrupt, have refused to join in this appeal, and appellee Thomas F. Boyle has refused to join therein, and petitioner prays that after notice served upon them requiring them to join in this appeal, their interests may be severed from the interest of petitioner.

And desiring to supersede the execution of said decree petitioner here tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

Dated July 27, 1914.

(Signed)
(Signed)
(Signed)
(Signed)

GEO. A. KNIGHT,
CHAS. J. HEGGERTY,
JAMES B. FEEHAN,
JOSEPH W. BERETTA,

*Solicitors for Appellee, Portuguese-American Bank
of San Francisco, Crocker Building, San Francisco, Cal.*

Receipt of a copy of the within Petition for Appeal this 27th day of July, 1914, is admitted.

(Signed)

A. F. MORRISON,
P. F. DUNNE,
W. I. BROBECK,
GAVIN McNAB,
B. M. AIKINS,
MILTON J. GREEN,

Solicitors for John Daniel, Trustee, etc., Appellant.

(Signed)

C. A. S. FROST,

Solicitor for Paul I. Welles, Appellant.

(Signed)

EDWARD F. MORAN,

Solicitor for Thomas F. Boyle, Appellee.

[Endorsed:] Petition for Appeal to Supreme Court U. S. Filed Jul-29, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation), Appellee.

Assignment of Errors.

And, now, on this 27th day of July, 1914, comes Portuguese-American Bank of San Francisco (a corporation), appellee in the above entitled cause, and in connection with its petition for appeal herein, presents and files therewith its assignment of errors, as to which matters and things it says the decree entered herein by the United States Circuit Court of Appeals for the Ninth Circuit on the ninth day of March, 1914, is erroneous, to-wit:

First. That said Court erred in holding and deciding that the provisions in the specifications annexed to the contract known as "Contract No. 6-A," between Metropolis Construction Company and the Board of Public Works of the City and County of San Francisco, State of California, that the contractor "shall not, either legally or equitably, assign any if the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works," made void the assignment of the fourth progress payment by the said Company to the appellee, Portuguese-American Bank of San Francisco.

Second. That said Court erred in holding and deciding that the assignment of the fourth progress payment, made by the Metropolis Construction Company to appellee, Portuguese-American Bank of San Francisco, was void because the Board of Public Works of the City and County of San Francisco had not consented thereto.

Third. That said Court erred in holding and deciding that the provisions in said contract requiring the consent of the Board of Public Works applied to assignment for security.

Fourth. That said Court erred in holding and deciding that the provisions in said contract against assignment unless with consent of the Board of Public Works were for the purpose of protecting subcontractors in their equitable rights to unpaid funds in the hands of the City in case notice should be given under Sec. 1184, Code of Civil Procedure of California.

Fifth. That said Court erred in holding and deciding that appellee, Portuguese-American Bank of San Francisco, was not the assignee in good faith and for value of said fourth progress payment.

Sixth. That said Court erred in holding and deciding that the assignment without the consent of the Board of Public Works gave appellant, Paul I. Welles, equities in the fourth progress payment superior to those of the appellee.

Seventh. That said Court erred in holding and deciding that said assignment required the consent of the Board of Public Works.

Eighth. That said Court erred in holding and deciding that said assignment was not consented to by said Board of Public Works.

Ninth. That said Court erred in not holding and deciding that the assignment held by appellee was good and valid as against the claims of Paul I. Welles.

Tenth. That said Court erred in not holding and deciding that the provisions of said contract against assignment unless with consent of the Board of Public Works were inserted for the benefit of and could be invoked by the City and County of San Francisco only.

Eleven. That said Court erred in holding and deciding that Paul I. Welles was entitled to have a decree entered in his favor on the ground that appellee's assignment was void.

Twelfth. That said Court erred in reversing the decree of the District Court on the ground that appellee had not a good and valid assignment.

Thirteenth. That said Court erred in not affirming the decree of the District Court.

Fourteenth. That said Court erred in reversing the case on the ground that the consent of the Board of Public Works to the assignment had not been obtained, for the reason that said objection was not raised in the District Court, nor assigned as error in the United States Circuit Court of Appeals.

Fifteen. That said Court erred in not holding and deciding that the District Court of the United States for the Northern District of California, First Division, was without jurisdiction to hear or determine this suit, for the reason that this appellee had never consented but had expressly objected to the jurisdiction of said District Court.

Wherefore, Portuguese-American Bank of San Francisco, a corporation, prays that the decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed.

(Signed)

(Signed)

(Signed)

(Signed)

GEO. A. KNIGHT,

CHAS. J. HEGGERTY,

JAMES B. FEEHAN,

JOSEPH W. BERETTA,

*Solicitors for Portuguese-American Bank of
S. F., Crocker Building, San Francisco, California.*

Receipt of a copy of the within Assignment of Errors this 27th day of July, 1914, is admitted:

| | |
|----------|--|
| (Signed) | A. F. MORRISON, |
| (Signed) | P. F. DUNNE, |
| (Signed) | W. I. BROBECK, |
| (Signed) | GAVIN McNAB, |
| (Signed) | B. M. AIKINS, |
| (Signed) | MILTON J. GREEN, |
| | <i>Solicitors for John Daniel, Trustee, etc., Appellant.</i> |
| (Signed) | C. A. S. FROST, |
| | <i>Solicitor for Paul I. Welles, Appellant.</i> |
| (Signed) | EDWARD F. MORAN, |
| | <i>Solicitor for Thomas F. Boyle, Appellee.</i> |

[Endorsed:] Assignment of Errors. Filed Jul- 29, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation), Appellee.

Order Allowing Appeal [to Supreme Court U. S.] and Severance [and Fixing Amount of Bond].

Portuguese-American Bank of San Francisco, a corporation, appellee in the above entitled cause, having filed herein its petition for appeal to the Supreme Court of the United States from the decree of the United States Circuit Court of Appeals for the Ninth Circuit rendered therein on the 9th day of March, 1914, and mentioned in said petition for appeal, and having also filed herein its assignment of errors; and it appearing that written notice of said appeal and of the time and place of its presentation for allowance, was duly given to appellants Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, and to appellee Thomas F. Boyle, notifying them to join therein, or failing to do so they would be made respondents; and it further appearing that they have not joined in said appeal and have declined to join therein:

It is ordered, that said appeal be and the same is allowed, and that said Paul I. Welles, John Daniel, Trustee as aforesaid, and Thomas F. Boyle, may be made respondents.

Further ordered, that said appeal shall operate as a supersedeas of the decree appealed from upon said appellee Portuguese-American

Bank of San Francisco giving a bond in the sum of one thousand dollars, conditioned according to law.

Dated August 1", 1914.

(Signed)

WM. W. MORROW,
*Judge of the Circuit Court of Appeals
for the Ninth Circuit.*

[Endorsed:] Order allowing appeal to Supreme Court U. S., and severance, and fixing amount of bond. Filed Aug. 1, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation),
Appellee.

Bond on Appeal [to Supreme Court U. S. and Order of Approval].

Know all men by these presents: That we, Portuguese-American Bank of San Francisco, a corporation, as principal and J. A. Silveira and Bernard Sherry, as sureties, are held and firmly bound unto Paul I. Welles, John Daniel, Trustee of Metropolis Construction Company, a Corporation, bankrupt, and Thomas F. Boyle, in the full and just sum of one thousand dollars, to be paid to the said Paul I. Welles, John Daniel, Trustee as aforesaid, and Thomas F. Boyle, their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of August in the year of our Lord One Thousand, Nine Hundred and fourteen.

Whereas in a suit depending in the United States Circuit Court of Appeals for the Ninth Circuit, numbered 2273, wherein Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, were appellants, and Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle were appellees, a decree was rendered and entered by said Court on the 9th day of March, 1914, reversing the decree of the District Court of the United States for the Northern District of California, First Division, and ordering the entry of a decree for said appellant Welles, and whereas said Portuguese-American Bank of San Francisco, a corporation, having obtained an appeal to the Supreme Court of the United States to reverse the said decree of the United States Circuit Court of Appeals for the Ninth Circuit, and a citation directed to said Paul I. Welles, John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, and Thomas F. Boyle,

citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, sixty days after the 1st day of August, 1914.

Now, the condition of the above obligation is such, that if the said Portuguese-American Bank of San Francisco, a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PORTUGUESE-AMERICAN BANK
OF SAN FRANCISCO,

[SEAL.] (Signed) By J. A. SILVEIRA, *President.*

(Signed)

J. A. SILVEIRA.

[SEAL.]

(Signed)

BERNARD SHERRY.

[SEAL.]

Attest

M. T. BETTENCOURT,

Asst Secretary Portuguese-

American Bank of San Francisco.

UNITED STATES OF AMERICA,

Northern District of California, ss:

J. A. Silveira and Bernard Sherry being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of one thousand Dollars, exclusive of property exempt from execution, and over and above debts and liabilities.

(Signed)

J. A. SILVEIRA.

(Signed)

BERNARD SHERRY.

Subscribed and sworn to before me this 1st day of August, 1914.

[SEAL.]

(Signed)

PAUL P. O'BRIEN,

Deputy Clerk U. S. Circuit Court of

Appeals for the Ninth Circuit.

The foregoing bond is approved this 1st day of August, 1914.

(Signed)

WM. W. MORROW,

Judge of the United States Circuit Court

of Appeals for the Ninth Circuit.

[Endorsed:] Bond on Appeal to Supreme Court U. S. and Order of Approval. Filed Aug. 1, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.
No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,
vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation),
Appellee.

Præcipe for Transcript on Appeal to Supreme Court of the United States.

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

You are requested to make a Transcript of Record, to be filed in the Supreme Court of the United States, upon the appeal to said Court by the Portuguese-American Bank of San Francisco in the above entitled cause, and to include in said Transcript the following:

1. The printed Transcript of Record.
 2. The order of submission.
 3. The Supplemental Transcript of Record.
 4. The opinion filed March 9, 1914.
 5. The decree of reversal entered on said date.
 6. The opinion filed July 6, 1914, on Petition for a Rehearing.
 7. The Petition for Appeal.
 8. The Assignment of Errors.
 9. The notice of Petition for Appeal and Severance.
 10. The order allowing appeal and severance and granting supersedeas.
 11. The Bond on Appeal.
 13. The citation on appeal.
 14. Clerk's certificate.
- San Francisco, August 4, 1914.

(Signed)

GEO. A. KNIGHT,
CHAS. J. HEGGERTY,
JAMES B. FEEHAN,
JOSEPH W. BERETTA,

Solicitors for Portuguese-American Bank of S. F.

Received a copy of the within Præcipe for Transcript on Appeal to Supreme Court of the United States this 5th day of August, 1914.

(Signed)

A. F. MORRISON,
P. F. DUNNE,
W. I. BROBECK,
GAVIN McNAB,
B. M. AIKINS,
MILTON J. GREEN,

Solicitors for John Daniel, Trustee, etc.

(Signed)

C. A. S. FROST,

Solicitor for Paul I. Welles, Appellant.

(Signed)

EDWARD F. MORAN,

Solicitor for Thomas F. Boyle, Appellee.

[Endorsed:] Præcipe for Transcript of Appeal to Supreme Court of the United States. Filed Aug. 5, 1914. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and forty-five (345) pages, numbered from and including one (1) to and including three hundred and forty-five (345), to be a true copy of the complete record made pursuant to the præcipe filed by counsel for said appellee on the 5th day of August, A. D. 1914, under Rule 8 of the Supreme Court of the United States, in the above-entitled case, including the Assignment of Errors on Appeal to the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinions filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record on appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to the said præcipe.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixth day of August, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a Corporation), Bankrupt, Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a Corporation), Appellee.

Citation on Appeal.

United States of America to Paul I. Welles, John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, and to Thomas F. Boyle, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington,

in the District of Columbia, sixty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Portuguese-American Bank of San Francisco, (a corporation), is appellant, and you are respondents, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William W. Morrow, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 1st day of August A. D. 1914, and of the Independence of the United States, the one hundred and thirty ninth.

WM. W. MORROW,
*Judge of the United States Circuit Court
of Appeals for the Ninth Circuit.*

Received a copy of the within Citation on Appeal this first day of August, 1914.

A. F. MORRISON,
P. F. DUNNE,
W. I. BROBECK,
GAVIN McNAB,
B. M. AIKINS,
MILTON J. GREEN,
Solicitors for John Daniel, Trustee, etc.
C. A. S. FROST,
Solicitor for Paul I. Welles.
EDWARD F. MORAN,
Solicitor for Thomas F. Boyle, Auditor, etc.

[Endorsed:] Docketed. No. 2273. In the United States Circuit Court of Appeals for the Ninth Circuit. Paul I. Welles and John Daniel, Trustee, etc., Appellants, vs. Portuguese-American Bank of San Francisco, (a corporation). Citation on Appeal. Filed Aug. 5, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Geo. A. Knight, Chas. J. Heggerty, Jas. B. Feehan, Jos. W. Beretta, Attorneys for Portuguese-American Bank of S. F. Crocker Building San Francisco.

Endorsed on cover: File No. 24,369. U. S. Circuit Court Appeals, 9th Circuit. Term No. 625. Portuguese-American Bank of San Francisco, appellant, vs. Paul I. Welles, John Daniel, trustee of Metropolis Construction Company, bankrupt, and Thomas F. Boyle. Filed September 19th, 1914. File No. 24,369.